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MEMORANDUM

TO: Task Force on Wrongful Convictions

FROM: Ezekiel Edwards

RE: Response to New York State District Attorneys Association’s Revised Identification Procedure Guidelines

DATE: 9/9/10

Introduction

On August 18, 2010 the New York State District Attorneys Association distributed a revised version of its Identification Procedure Guidelines (“Guidelines”). Unfortunately, the revisions did not address the three most important shortcomings of the Guidelines which the Innocence Project highlighted in an earlier memorandum – the failure to recommend double-blind lineup administration when practicable, the failure to adopt proper “blinded” administration, and the failure to require lineup administrators to take a confidence statement from witnesses immediately following an identification. See Ezekiel Edwards, Memo to the Task Force on Wrongful Convictions (May 27, 2010) (hereinafter “May 27 Memo”). Other than removing some (but not all) of the unnecessary editorializing language and requiring administrators to ask follow-up questions to vague witness responses, the revisions do not adequately address any of the substantive criticisms put forth by the Innocence Project. See May 27 Memo.

Double-Blind Lineup Administration

The revised Guidelines remove unnecessary editorializing language from the definitions of blind and non-blind lineup administrators. However, the Guidelines still fail to recommend double-blind administration, even when practicable, an essential best practice for minimizing the risk of mistaken identifications. See May 27 Memo. Moreover, the Guidelines do not acknowledge the benefits derived from double-blind lineup administration or the research supporting the experimenter expectancy effect. Ironically, although the now-retracted instruction that investigators “remain neutral throughout the identification procedure” is ineffective for guarding against inadvertent cueing, and thus is not an adequate substitute for double-blind or blinded lineups, given that the Guidelines do not endorse double-blind administration, and given that they encourage a form of “blinded” administration that does not guarantee the blinding of the administrator, the authors should consider reinserting some language instructing non-blind administrators to remain neutral and thus, at least, better protect lineups from any overt suggestion by non-blind administrators.

Witness Instructions

The revised witness instructions regarding the knowledge of the lineup administrator now reads, “Do not assume I know who the perpetrator is.” This instruction unnecessarily (and potentially suggestively) implies to the witness that the administrator may know who actually committed the crime. Yet a lineup administrator will not “know” who the *perpetrator* is; rather, the administrator can only ever know who the *suspect* is. Therefore, if the administrator is not blind, the instruction should read, “I do not know who the perpetrator is.” If the administrator is blind, the instruction should read, “I do not know who the suspect is.”

Documenting the Procedure and Confidence Statements

The additional requirement that administrators follow-up on vague or unclear witness responses makes sense; however, such follow-up does not cure the failure of the Guidelines to require the administrator to take a confidence statement from the witness following an identification. While the Guidelines no longer explicitly prohibit administrators from asking about witnesses’ confidence, they are still silent on requiring administrators to document the confidence of the witness in his or her own words at the time of the identification. See May 27 Memo. As stated in our previous memo, undisputed scientific research shows that witnesses’ confidence levels are malleable and easily inflated by confirming feedback. To the extent that a witness will express confidence in an identification at trial, it is imperative that there is a record of that witness’s confidence at the time of the identification so that juries can more



meaningfully assess this type of evidence.

Conclusion

Regarding additional concerns about the Guidelines, we would refer the Task Force to our May 27 memorandum. We continue to urge the New York State District Attorneys Association to make substantive revisions to its Guidelines consistent with the comments and suggestions set forth in our memoranda.